Supreme Court, U.S.
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No. 00-1607

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

PARKER, WARDEN,

Petitioner

Vs.

EUGENE W. GALL, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant *certiorari* on the issue of whether the standards of review used by the Sixth Circuit were correct when the Sixth Circuit used the appropriate standards of review depending upon the nature of the issue being reviewed, when there is no conflict within the Sixth Circuit on the correct standard of review, when apparent conflicts between the circuits are not significant, when the petition seeks review while misstating a holding of the Sixth Circuit and where the Sixth Circuit painstakingly and carefully reviewed the voluminous facts of this pre-AEDPA case in its 131 page opinion, properly applied the settled law to the complex facts, gave appropriate deference to the state and district courts' findings of fact as required by this Court, and where petitioner does not point out with specificity where the Sixth Circuit's factual account differs from either the state court's or the district court's?

2. Should this Court take the extraordinary action of granting *certiorari* review on the grounds that the Sixth Circuit improperly applied the settled legal standards of *Jackson v. Virginia*, 433 U.S. 307 (1979) and the presumption of correctness under 28 U.S.C. Section 2254 to the unique and lengthy facts of this pre-AEDPA case when petitioner fails to demonstrate with any specificity how the Sixth Circuit improperly applied these standards, particularly since the Sixth Circuit fairly, meticulously, and correctly applied the settled standards to the complex facts?

3. Should this Court grant *certiorari* review where the Sixth Circuit found numerous constitutional violations and correctly granted relief from Gall's fundamentally unfair trial and unconstitutional sentence of death, violations which included a conviction for murder without sufficient evidence presented on an element of the offense, the unconstitutional shifting of the burden of proof on an element of the offense, the improper exclusion of a juror for his views on capital punishment, egregious prosecutorial misconduct during the guilt phase closing argument, prejudicial information that Gall was on parole coming into the jury room from outside the judicial process, and requiring the jurors to be unanimous prior to considering mitigation during their penalty phase decision?

4. Should this Court grant a petition for writ of *certiorari* where the judgment of the Sixth Circuit is otherwise correct, given the numerous other constitutional violations occurring at trial which provide an alternative basis for relief, including but not limited to:

   a) Gall was incompetent to stand trial or act as his own lawyer in part;
   b) Failure to strike juror for cause;
   c) Ineffective assistance of trial counsel;
   d) Failure to change the venue of the trial in view of the massive publicity in rural Boone Co.;
   e) Gall's unwaived absence from a critical pretrial deposition that was presented as the primary rebuttal of his insanity defense;
   f) Minimization of the jurors' decisionmaking on penalty;
   g) Improper instructions that failed to require jurors to consider all mitigation and by more than a preponderance;
   h) The murder instruction omitted a major element;

i) Failure of sentencers to consider the overwhelming evidence of mitigation of his crime and sentence:
j) Evidence of insanity was overwhelming: and
k) Improper reference to Gall's silence at trial?

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STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The Sixth Circuit carefully and accurately set out the facts of this case, including adopting the facts of the crime penned by the Kentucky Supreme Court. (A4-6).[1]

The Sixth Circuit granted the Writ on numerous grounds:

- Failure of the prosecution to rebut extreme emotional disturbance as required by Kentucky law:
- Improper shifting of the burden of proof on one element of murder:
- Improper exclusion of a juror:
- Improperly requiring unanimity on mitigation:
- Prosecutorial misconduct:
- Improper consideration of prejudicial extraneous information:

I.
EXTREME EMOTIONAL DISTURBANCE

In 1971, Gall was found to be of "unsound mind" and unable to "be of assistance to his counsel." He was placed in a mental hospital to await competency for two years. In 1978, immediately after arrest and arraignment, the focus immediately was placed on Gall's mental state. The trial court appointed Dr. Robert Noelker, a clinical psychologist, to evaluate Gall in order to determine whether he was competent to stand trial. Dr. Noelker also evaluated Gall to determine his mental state at the time of the crime. Dr. John Toppen, a psychiatrist, also evaluated Gall for both competency and sanity purposes. Dr. Lee Chutkow, a psychiatrist, was appointed on the Commonwealth's motion to evaluate Gall for competency purposes alone.

All three mental health experts testified at Gall's trial. Dr. Noelker testified that Gall suffered from "a psychotic disorder—'the most severe type of personality disorder that we know.' J.A. at 956. Dr. Noelker testified that psychotic disorders of the type Gall suffered are 'commonly characterized …by a loss of contact with reality [,] by an inability to control one's behavior or

[1] Citations are as follows: P - for Warden's Petition for Writ of Certiorari; A - for Warden's Appendix to the Petition for Writ of Certiorari; JA - Joint Appendix to Sixth Circuit Brief; TR- trial transcript of record; TE - trial transcript of evidence.

thinking, by delusions, hallucinations, by grandiosity, and by inappropriate affect of the circumstances he is under." (A10). Dr. Noelker concluded that Gall suffered from paranoid schizophrenia. (*Id.*) There was "'absolutely no question in [his] mind" that Gall was insane when he killed Lisa Jansen. Further, Dr. Noelker "stated explicitly to the jury that Gall was in a state of 'extreme emotional disturbance' on April 5." (A27).

Dr. Toppen agreed with Dr. Noelker, testifying that Gall had "'schizophrenia of a paranoid type and chronic in nature,'" and that he was in a "psychotic paranoid schizophrenic state when he committed the rape and killing on April 5, 1978, and therefore lacked capacity to conform his behavior to the requirements of the law." (A11). Dr. Toppen also agreed that Gall was extremely emotionally disturbed at the time of the crime. (Dr. Toppen TR 279, 283-285). The Commonwealth offered virtually no evidence to contradict the evidence of insanity and extreme emotional disturbance. The Commonwealth did offer the videotaped testimony of Dr. Lee Chutkow, conducted outside of Gall's presence and without a waiver from Gall, to rebut Gall's two experts. Dr. Chutkow had examined Gall one time for purposes only of determining competency to stand trial. Dr. Chutkow was summoned to the trial believing he was at a competency hearing, and testified believing he was there only on that issue. (A77). His deposition was taken in the courthouse while Gall's trial was taking place. The Sixth Circuit summarized his testimony thusly. The "gist of his testimony was that Gall was competent to stand trial—indeed, the sole purpose of his only examination of Gall had been to determine Gall's competency...Dr. Chutkow also stated his belief that Gall did not have one particular form of paranoid schizophrenia on the day of the crime and could at times appreciate the criminality of his conduct...But Dr. Chutkow at no point disputed the showing that Gall suffered from a psychotic disorder sufficient to constitute an EED. In fact, for several reasons, his

testimony failed to rebut in any way the evidence that Gall suffered from EED while committing the killing." (A28).

On appeal to the Kentucky Supreme Court, Gall raised several issues pertaining to EED. Gall asserted that the Commonwealth had put forward no evidence on an element of murder, the absence of extreme emotional disturbance. In rejecting this issue, the Kentucky Supreme Court stated that unless "the evidence raising the issue is of such probative force that otherwise the defendant would be entitled as a matter of law to an acquittal on the higher charge (murder), the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof." (A34).

The Sixth Circuit held that Gall's due process rights were violated in several respects on the issue of extreme emotional disturbance. "[E]ven when we make all inferences in the Commonwealth's favor, we can not conclude that a rational trier of fact would find an absence of EED beyond a reasonable doubt at the time Gall killed Lisa Jansen. At no point did the Commonwealth rebut Gall's showing that he suffered from chronic paranoid schizophrenia at the time of the killing. Neither did the Commonwealth counter Dr. Noelker's explicit statement that Gall was under EED when he committed the crime. Instead, not only did Dr. Chutkow state that he had no basis to contest Dr. Noelker's findings, but he acknowledged that other disorders, including chronic paranoid schizophrenia, were distinct possibilities, and that Gall could have been in a state of exacerbation. Neither did the one-time, surface-level observations by the lay witnesses create a dispute over Gall's mental state. Because even when viewing the evidence in a light most favorable to the Commonwealth, a rational trier of fact could not have found one of the elements of murder beyond a reasonable doubt. Gall's conviction for murder violated due process." (A33).

The Sixth Circuit also held that the Kentucky Supreme Court violated Gall's due process rights by shifting the burden of proof on an element of the offense to Gall. "Given that the absence of EED was an element of murder under Kentucky law—a principle of law that *Gall I* accepted and that the Kentucky Supreme Court would not overrule for several years—this portion of *Gall I* directly violates *Mullaney* and *In re Winship*. The *Gall I* regime shifted the burden to defendants to produce evidence of EED 'of such probative force that...the defendant would be entitled as a matter of law to an acquittal.'" (A 35).

II.
IMPROPER EXCLUSION OF JUROR

A significant issue in this case was the unconstitutional exclusion of Juror Correll for cause. He was uncertain how he felt about capital punishment. He assured the trial judge during the voir dire that he could and would follow the law. He stated that his mind was not closed to the imposition of the death penalty. He stated that it was very possible that he would feel like the death penalty was appropriate in particular cases. However, he remained mostly uncertain about whether his feelings about the death penalty would absolutely preclude him from imposing a sentence of death.

The Sixth Circuit held that the "trial court committed reversible error in excluding Correll. Its decision is not supported by the record, and violated clear precedent." (A100). "Correll's discomfort with the death penalty did not appear to '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" (A101). "Correll's statements that his decision would likely depend on the facts he was faced with also suggested that his selection would comport with a trial court's 'quest' to find jurors who 'conscientiously apply the law and find the facts.' *Witt*, 469 U.S. at 423." (A 101-102).

III.
IMPROPERLY REQUIRING UNANIMITY ON MITIGATION

Another significant issue in this case involved the trial court's giving a penalty phase instruction which required Gall's twelve jurors to make unanimous findings on mitigation. This was accomplished by requiring the jurors to use a special verdict form to specifically make findings on aggravation and mitigation by answering questions *yes* or *no*. It required a written finding on mitigating circumstances signed by the foreman. The jury found in their verdict form no evidence of mitigation.

The Sixth Circuit held that just "as in both *Mills* and in *McKoy*, the Gall instructions made quite probable the disturbing hypothetical of individual jurors finding mitigating factors but being unable to give effect to those factors because of a lack of unanimity. Such a defect constitutes the 'height of arbitrariness,' and is the 'precise defect that compelled the [Court] to strike down the Maryland scheme in *Mills*." (A94).

The instruction and verdict form used in *Gall v. Parker*, 231 F3d 265 (6th Cir. 2000) are like no other ever used in Kentucky, as there was one verdict form that required the jury to write "yes" or "no" after each mitigating circumstance "finding." The trial judge also instructed the jurors. "Your *findings* and verdict must be *unanimous* and must be signed by the foreman...." (JA 1624) (Emphasis added). There is no other known case where a Kentucky trial judge has instructed jurors to make *findings* with "yes" or "no" answers.

IV.
EGREGIOUS CLOSING ARGUMENT

The prosecutor gave an egregiously flawed closing argument during the guilt phase of the case. The improprieties in the closing argument involved the heart of the case, insanity and extreme emotional disturbance. The Sixth Circuit held that the closing argument was "laced with

improper, prejudicial statements." (A65). "[T]hroughout his closing argument the prosecutor improperly expressed his personal belief about crucial matters before the jury." (A66). The "Commonwealth mischaracterized crucial evidence and testimony pertaining to Gall's showing of EED and insanity. Misrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.' *Donnelly*, 416 U.S. at 646." (A67). "These comments and misrepresentations comprised part of a broader strategy of improperly attacking Gall's insanity defense by criticizing the very use of the defense itself, rather than addressing its evidentiary merits head on." (A68).

That was not all. "Finally, the prosecution's most egregious misconduct was warning that Gall would go free if found not guilty for reason of insanity. During his closing, the prosecution stated: 'Now folks are we going to turn [Gall] loose on society by reason of insanity[?] (JA at 1588-89). Seconds later, he repeated: Gall 'cannot escape the ends of justice by retreating within the safety of his own skull!' (JA at 1589). At another point, the Commonwealth stated that if the jury were to believe Dr. Toppen's testimony, 'then turn him loose.'" (A71).

The Sixth Circuit summed up what was a long and improper closing argument, and the constitutional violations created there. "In sum, facing Gall's considerable evidence of insanity and EED, counsel for the Commonwealth chose not to rebut that evidence directly. Instead, he expressed his personal belief as to the weakness and partiality of Gall's expert witnesses' testimony, and he mischaracterized crucial aspects of that testimony. He disparaged the very use of an insanity defense...he belittled the medical and psychological tools used to support such a defense...He then pleaded with the jury not to let Gall loose through the insanity defense. In

addition to having no doubt that these tactics were improper, we find that they easily satisfy the criteria of 'flagrancy' laid out in *Boyle*. They clearly misled the jury and prejudiced Gall's defense of insanity. The comments were not accidental or isolated, permeating the Commonwealth's closing argument as well as other portions of the trial. And they involved the central issue of the case. Moreover, as explained *infra*, the total strength of the evidence rebutting Gall's insanity defense was weak at best, not to mention improperly presented. After a close review of the record, we find that the Commonwealth" misconduct was sufficiently egregious to render the entire trial fundamentally unfair.""(A71-72).

V.

IMPROPER CONSIDERATION OF PREJUDICIAL EXTRANEOUS INFORMATION

Juror Palmer considered improper extraneous influences. Palmer stated in voir dire at trial that he had read "very little" about the case and heard it "just briefly on the news." (Palmer TE 859). Palmer knew almost absolutely nothing about Gall's past since he was gone practically the whole summer. (Palmer TE 873).

Palmer served as a juror in this case and found Gall not insane, guilty of murder, and deserving of death. After deliberating 18 minutes at the conclusion of the penalty phase, the jurors asked the trial judge if they decided on a life sentence whether Gall would be paroled. The Court stated it could not advise them on parole or pardon. (TE 2198-99).

Later, in an evidentiary hearing in the United States District Court, "Palmer indicated that he was aware of Gall's parole status when he committed the crime...Palmer also indicated that the question of parole—the fact that he committed the crime while on parole, and the potential for parole from a life sentence—played an important role in the jury's decision to render a death sentence." (A102).

The Sixth Circuit found that "Gall's parole status was improper 'extraneous' information...[W]e believe that the jury's extraneous knowledge of Gall's parole status at the time of the killing, and the trial court's failure to respond appropriately to its question regarding parole, inflicted 'substantial and injurious effect or influence in determining the jury's verdict.' *Brecht*, 507 U.S. at 638." (A107-108).

VI.
MISSTATEMENT

Petitioner incorrectly states that the Sixth Circuit "by divided vote issued a published opinion finding constitutional errors in the guilt and penalty phases of Gall's trial." (P8). While the Sixth Circuit divided 2-1 on most issues, it was unanimous on the need for a new penalty phase. (A113-14; 115 n.3) (Guy, J concurring on the penalty phase errors of *Witherspoon*; *Mills* instruction/verdict form; and extraneous prejudicial parole information, dissenting in part).

Further, review *en banc* was denied by the full Sixth Circuit.

VII
OTHER GROUNDS RAISED BY GALL

The Sixth Circuit did not grant the writ on the following grounds raised by Gall:

a) Gall was incompetent to stand trial or act as his own lawyer in part;

b) Failure to strike juror for cause;

c) Ineffective assistance of trial counsel;

d) Failure to change the venue of the trial due to massive publicity in rural Boone Co.;

e) Gall's unwaived absence from a critical pretrial deposition that was presented as the primary rebuttal of his insanity defense;

f) Minimization of the jurors' decisionmaking on penalty;

g) Improper instructions that failed to require jurors to consider all mitigating and by more than a preponderance;

h) The murder instruction omitted a major element;

i) Failure of sentencers to consider the overwhelming evidence of mitigation of his crime and sentence:

j) Evidence of insanity was overwhelming.

k) Improper reference to Gall's silence at trial.

(Gall's Sixth Circuit August 11. 1994 Brief).

REASONS FOR DENYING THE WRIT

I.
THE SIXTH CIRCUIT CAREFULLY STATED THE CORRECT APPLICABLE STANDARDS OF REVIEW OF BOTH FACT AND LAW AND IN APPLYING THOSE STANDARDS GAVE APPROPRIATE DEFERENCE TO THE FINDINGS OF FACT MADE BY BOTH THE STATE COURT AND THE UNITED STATES DISTRICT COURT.

THE SIXTH CIRCUIT GAVE APPROPRIATE DEFERENCE TO THE FINDINGS OF FACT MADE BY THE LOWER COURTS.

Petitioner has asserted as the primary reason for this Court's taking review of this case, review being granted only for "compelling reasons," that of the Sixth Circuit having determined facts "de novo from the state court record and by rejecting findings of fact by the state courts and U.S. District Court." (P9).

The Sixth Circuit painstakingly and carefully reviewed the facts of this case, and gave deference where appropriate to the state and United States District Court. The Sixth Circuit first adopted the Kentucky Supreme Court's "detailed account of the facts at issue" regarding the crime. (A4-6). The Court thereafter recited the facts pertaining to the pretrial and trial events, doing so in a careful and meticulous manner. Petitioner has not contradicted the Sixth Circuit's recitation of the facts. Petitioner has not pointed out with specificity where the Sixth Circuit's factual account differs from either the factual findings in the state court opinion or the United States District Court opinion.

Petitioner complains that the Sixth Circuit "*implicitly* rejected numerous express and *implied* findings of fact made by the state courts and by the U.S. District Court, when the Sixth Circuit panel found reversible error occurred and failed to discuss the findings of fact made by the state courts and United States District Court." (A9). Later, Petitioner complains that the

Sixth Circuit "*sub silentio*" rejected findings of facts of the lower courts. (A14). This Court does not review hypothetical issues that are neither specific nor significant.

The only specific complaint registered in the petition regarding standards of review is that the Sixth Circuit erred in its findings regarding the issue of the failure of the prosecution to prove an element of the offense, the absence of extreme emotional disturbance, beyond a reasonable doubt. However, Petitioner states this in a fashion that demonstrates that there is no complaint regarding the facts. "*To the extent that the discussion by the U.S. District Court contains factual determinations*, none of those determinations were discussed by the Sixth Circuit panel majority in concluding that Gall was entitled to a directed verdict of acquittal regarding the issue of extreme emotional disturbance." (P14) (Emphasis Added). However, a review of the United States District Court opinion reveals that court spent little space discussing either the facts or the law on this issue. The United States District Court's opinion on extreme emotional disturbance consists of no factual account, and less than a page of discussion. (A171-172). The United States District Court reviewed the facts surrounding insanity, but simply did not address extreme emotional disturbance factually. The Sixth Circuit, instead, had to scour the state court records to find the facts pertaining to extreme emotional disturbance. Appropriate deference was given to both state and United States District court findings of fact on the only specific issue identified by Petitioner.

There was no disputed factual issue regarding extreme emotional disturbance. It was as stated by the Sixth Circuit opinion. "[T]he Commonwealth failed to rebut this showing of EED—in fact, it does not even claim to have done so in the brief it filed with this Court." (A28). In footnote 11, discussing lay testimony, the Court notes that "neither the district court nor the Commonwealth (in its brief) points to this evidence to rebut Gall's argument that no evidence

was presented rebutting his showing that he suffered from EED at the time of the killing." (A30). It is far too late now for the Petitioner to complain about the manner in which the Sixth Circuit reviewed the facts when it failed to avail itself of the opportunity to do so at the appeals court level.

The Sixth Circuit demonstrated high respect for the findings of fact made by the Kentucky Supreme Court by adopting them in whole. The Sixth Circuit could show no deference to the findings of fact made by the United States District Court in the complained-of area because that court made no findings of fact. Petitioner has shown no compelling reason for granting *certiorari* review.

THE SIXTH CIRCUIT USED THE APPROPRIATE STANDARDS OF REVIEW

Petitioner further complains that the Sixth Circuit used the incorrect standard for reviewing the District Court's findings of fact "that supplement the findings made by the state courts." (P11).

The Sixth Circuit carefully stated and followed the appropriate standards of review. In a preamble to the body of the opinion, the Court set out the standards of review it would be using. The Court noted that it would apply *de novo* review of the district court's decision not to grant the writ of habeas corpus. (A13). The Court further stated that it would "review the district court's findings of fact for clear error." (*Id.*). "Primary or historical facts" found by the state court were presumed correct and "'rebuttable only by clear and convincing evidence.'" (*Id.*). Where the district court had made findings of fact based upon its review of the state court record, the Court reviewed those facts by engaging in plenary review. And where there had been determinations of federal law, or mixed questions of law and fact, review was *de novo*.

In this preamble to a lengthy, complex opinion, the Sixth Circuit carefully outlined the proper standards of review for the many different situations found in this case.

THERE IS NO CONFLICT INSIDE THE SIXTH CIRCUIT

Petitioner states that review should be granted because the Sixth Circuit's application of the standard of review regarding findings of fact made by the United States District Court based on the state court record is "wholly arbitrary," citing a series of cases in alleged conflict. (P 12).

Petitioner is correct that in this case, the Sixth Circuit stated that it utilized *de novo* review of the district court's findings of fact when reviewing the state court record. "District court findings of fact based upon its review of state court records or written decisions receive plenary review." (A13). However, the first cited case that is alleged to be in conflict inside the Sixth Circuit, *McQueen v. Scroggy*, 99 F. 3d 1302 (6th Cir. 1996), does not reveal a conflict as alleged by Petitioner. In a similar preamble of the different standards of review, the *McQueen* court says nothing about review of finding of facts based upon a review of the state court record. Instead, the Court states that they "review the district court's factual findings only for clear error." In *Gall*, the Court similarly stated "[w]e review the district court's findings of fact for clear error." (A13). Petitioner cites no specific language in the Sixth Circuit's opinion that reveals the alleged arbitrariness under the circumstance of the federal district court's findings of fact based upon a state court's record.

Similarly, in the next cited case, *Delisle v. Rivers*, 161 F. 3d 370 (6th Cir. 1998) (*en banc*), the Court stated that when "reviewing a district court's disposition of such an application, we review the district court's legal conclusions *de novo*, and any findings of fact for clear error." (*Id.* at 380). This is identical to the different standards expressed in *Gall*. The same is true of *Carpenter v. Mohr*, 163 F. 3d 938 (6th Cir. 1998), revd. on other grounds, *sub nom. Edwards v. Carpenter*, 529 U.S. 446 (2000), and *Coleman v. Mitchell*, 244 F. 3d 543 (6th Cir. 2001). There

is consistency rather than arbitrariness in these opinions of the Sixth Circuit on the appropriate standard to review a United States District Court decision in a habeas case.

ANY APPARENT CONFLICTS BETWEEN THE CIRCUITS ARE NOT SIGNIFICANT.

Petitioner states that this Court should grant review of this case because there is a conflict between the different circuits "when the U.S. District Court supplements state court findings of fact with additional findings in habeas proceedings because some courts apply the clearly erroneous standard whereas other courts apply a *de novo* standard." (P10). However, Petitioner does not state with any specificity any fact the Sixth Circuit is alleged to have gotten wrong, or where the application of an erroneous standard would have made any difference whatsoever. While there may be a hypothetical conflict between circuits on how they are treating facts found by a U.S. district court when reviewing a state court record as opposed to holding an evidentiary hearing, that hypothetical conflict is of no import here where none of the findings of fact made by the Sixth Circuit are the subject of complaint. Even if the Sixth Circuit used an erroneous standard, which it did not, there would be no harm done whatsoever because Petitioner fails to specifically identify the areas of factual dispute.

Petitioner states that the 11th Circuit uses the clearly erroneous standard under these circumstances. However, *Spanziano v. Singletary*, 36 F. 3d 1028 (11th Cir. 1994) states that where there is a "finding of historical fact—what the judge knew and what he did—we review the finding under the deferential clearly erroneous standard." *Id.* at 1032. Similarly, in *Gall*, the Court stated that "historical facts found by state courts are 'presumed correct and are rebuttable only by clear and convincing evidence.'" (A13). No conflict is apparent between the Sixth Circuit and the Eleventh Circuit.

Petitioner is correct that the Eleventh Circuit has followed *Anderson v. Bessemer City*, 470 U.S. 546 (1985) to review findings of fact made by U.S. district courts generally. *Anderson*, a civil rights case, utilizes the clearly erroneous standard. However, *Anderson* is not inconsistent with the menu of standards used by the Sixth Circuit in this case. *Gall* too, while not citing *Anderson*, explained that the clearly erroneous standard was being used under some appropriate circumstances. (A13).

THE PETITION MISSTATES A HOLDING OF THE SIXTH CIRCUIT

Petitioner states that the Sixth Circuit held that "testimony by lay persons regarding Gall's mental or emotional state at the time shortly after he killed Lisa Jansen must be ignored in determining sufficiency of the evidence." (P15).

Besides being irrelevant to the stated reason for granting the writ, this seriously misstates the holding of the Sixth Circuit. The Sixth Circuit stated that "this Circuit does not apply a *per se* rule barring lay testimony from creating an issue of fact as to a defendant's state of mind...we have long been skeptical of such lay testimony." (A30).

Petitioner states that "the panel majority ignored an earlier Sixth Circuit ruling that state evidentiary law must be taken into account." (P15). The Sixth Circuit relies explicitly upon state evidentiary law in its opinion in this case. "Kentucky courts have long allowed lay witnesses to testify as to their opinion of a defendant's mental state, but have consistently emphasized the need for a sufficient basis on which that witness can form her opinion. *See Brown v. Commonwealth*, 934 S.W. 2d 242, 248 (Ky. 1996) (noting longtime precedent that lay witnesses can testify as to a defendant's sanity when 'by association and observation [they] have had an opportunity to form an opinion as to the sanity of the person'." (A30-31).

II.

THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE EVIDENCE PRESENTED ON THE ELEMENT OF THE ABSENCE OF EXTREME EMOTIONAL DISTURBANCE WAS SO LACKING THAT NO RATIONAL TRIER OF FACT COULD HAVE FOUND THE REQUIRED ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

Petitioner asserts that this Court should take the extraordinary action of granting *certiorari* because the Sixth Circuit "improperly applied *Jackson v. Virginia*, 443 U.S. 307 (1979) and the presumption of correctness under 28 U.S.C. §2254." Yet, Petitioner fails to demonstrate with any specificity how the Court improperly applied the *Jackson* standard, or how the Court failed to properly use the presumption of correctness. Even if correct, an improper application of an accurate standard of review is hardly a compelling reason for this Court to exercise its *certiorari* jurisdiction.

Having said that, any fair reading of the Sixth Circuit opinion in this case is that the Court exalted the standard in *Jackson*, and applied it fairly, meticulously, and correctly to the complex facts of this case in order to determine whether a constitutional violation had occurred. The Court explicitly stated that it was applying *Jackson*. (A19). The Court acknowledged that the credibility of witnesses was "beyond the scope of review," citing *Schlup v. Delo*, 513 U.S. 298 (1995), and did not attempt to do so. (*Id.*). After applying these principles, the Court found that "Gall's due process rights have been violated. We do so because the Commonwealth's showing of the absence of extreme emotional disturbance ("EED")—an element of murder in Kentucky at the time—was so lacking no rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319." (A21).

The Court "closely scrutinized the record." (A26). The Court carefully went over all of the evidence, particularly the evidence demonstrating Gall's severe mental pathology as it was presented to prove extreme emotional disturbance. (*See* A27-33). In contrast, the Kentucky Supreme Court's review of the evidence pertaining to EED was cursory; and the U.S. District

Court's review was nonexistent. Only the Sixth Circuit took seriously the *Jackson* standard in its review of the evidence.

The Court found that the absence of extreme emotional disturbance was an element of murder in Kentucky at the time of the crime. The Court further found that the evidence admitted in the case clearly established extreme emotional disturbance using Kentucky law at the time of the crime. The Court found that the Commonwealth had failed to rebut this evidence of extreme emotional disturbance, or to prove the absence of extreme emotional disturbance. The Court found that under the *Jackson* standard, no rational trier of fact could have found that the absence of extreme emotional disturbance had been proven beyond a reasonable doubt.

After reviewing all of the evidence carefully, the Court returned to the standard of review. "Even under *Jackson's* highly deferential standard of review for sufficiency of the evidence, we find that the Commonwealth did not meet its burden of showing an absence of EED beyond a reasonable doubt." (A26). Clearly, the Court applied *Jackson* seriously and often. The Petitioner simply disagrees with how *Jackson* was applied, and asks for review of that application, without demonstrating in any way that the manner in which *Jackson* was applied was not carefully and accurately used.

Petitioner again states that review is warranted because the Sixth Circuit failed to find that lay witnesses' testimony had been sufficient to prove the absence of extreme emotional disturbance. Interestingly, neither the Petitioner nor the District Court pointed previously to this evidence "to rebut Gall's argument that no evidence was presented rebutting his showing that he suffered from EED at the time of the killing." (A28; 30). Petitioner asserts that the Sixth Circuit "decid[ed] for itself that such testimony was not credible." (P20). Rather, the Sixth Circuit relied upon Kentucky law requiring "a sufficient basis on which that witness can form their

opinion." citing *Brown v. Commonwealth*, 934 S.W.2d 242, 248 (Ky. 1996) and several other Kentucky cases in support. The Sixth Circuit did evaluate whether the testimony of the lay witnesses in this case was sufficient to rebut the overwhelming expert testimony demonstrating that Gall was extremely emotionally disturbed, and concluded the lay evidence was insufficient. The Sixth Circuit found that the witnesses observed Gall not at the time of the offense but several hours later (A31). The Court found that they had only a brief time to observe Gall. (*Id.*). The Commonwealth did not show that the lay witnesses "had the capacity to determine if Gall was either insane or under EED." (*Id.*). The Court was not gauging the witnesses' credibility, but was rather making an evaluation of legal sufficiency.

Moore v. Duckworth, 433 U.S. 713 (1979), cited by Petitioner, does not differ with the decision of the Sixth Circuit. Rather, *Moore* states that the analysis of the sufficiency of the evidence (there in an insanity case) is dependent upon state law; in that case, lay testimony in Indiana was used in the sufficiency evaluation. The Sixth Circuit decision in this case does not differ with *Moore*; rather, the decision states that lay testimony of certain quality may be used to evaluate the sufficiency of the evidence. (A30-31).

Petitioner states that the Sixth Circuit had also erred in "concluding that a jury could not take into account circumstantial evidence regarding the murder, and the events preceding and following the act of murder in deciding on a defendant's state of mind, in order to conclude that the prosecution had proved its case beyond a reasonable doubt." (P21). Petitioner cites no place in the record where that holding is present. The Sixth Circuit held nothing of the kind.

III.

THE SIXTH CIRCUIT CORRECTLY DECIDED THAT THE KENTUCKY SUPREME COURT HAD SHIFTED THE BURDEN OF PROOF ON THE ELEMENT OF THE ABSENCE OF EXTREME EMOTIONAL DISTURBANCE IN VIOLATION OF *MULLANEY V. WILBUR*, 421 U.S. 684 (1975).

The Sixth Circuit decided that the decision of the Kentucky Supreme Court shifted the burden of proof on the important element of the offense of homicide, the absence of extreme emotional disturbance, in violation of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). "[T]he Court announced, even though Gall presented evidence sufficient to require a jury instruction that the absence of EED had to be established beyond a reasonable doubt, the prosecution did not in fact have to prove its absence beyond a reasonable doubt. Given that the absence of EED was an element of murder under Kentucky law—a principle of law the *Gall I* accepted and that the Kentucky Supreme Court would not overrule for several years—this portion of *Gall I* directly violates *Mullaney* and *In re Winship*...We find that the *Gall I* Court, by requiring a defendant to offer evidence 'of such probative force that otherwise [he] would be entitled as a matter of law to an acquittal on the higher charge' places an equally weighty burden on that defendant, and thus violates due process." (A34-35).

Petitioner has not cited this holding as a reason for granting *certiorari* review of the Sixth Circuit opinion. This decision, then, will stand irrespective of this Court's decision on Petitioner's cited claims. Because the Sixth Circuit judgment is correct in light of this constitutional violation, it will not be ultimately affected by this Court's resolution of the other claims made by Petitioner. This case is a poor vehicle for considering Petitioner's claims.

IV.
THE SIXTH CIRCUIT EXPLICITLY USED THE PRESUMPTION OF CORRECTNESS IN DECIDING THAT THE EXCLUSION OF JUROR CORRELL WAS NOT FAIRLY SUPPORTED BY THE RECORD AS A WHOLE.

The Sixth Circuit decision in this case on this issue is entirely consistent with established principles of law expressed in *Adams v. Texas*, 448 U.S. 38 (1980), *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Lockhart v. McCree*, 476 U.S. 162 (1986). The Sixth Circuit merely applied complicated facts to these settled principles of law.

The Sixth Circuit decision utilized the presumption of correctness, but further found that the exclusion of juror Correll was not fairly supported by the record as a whole. Deference to the findings of fact under *Wainwright v. Witt* made by the trial court or by the Kentucky Supreme Court does not mean that the previous fact finding is beyond review.

The Sixth Circuit, contrary to Petitioner's assertion, explicitly used the presumption of correctness in making its decision. (A100). "A trial court's decision to strike a juror based on his or her views of capital punishment is a factual determination. Under 28 U.S.C. §2254, such a determination is entitled to a presumption of correctness, to be overturned only if it is not fairly supported by the record viewed as a whole." (*Id.*) Petitioner is incorrect when it is asserted that the Sixth Circuit utilized *de novo* review.

The Sixth Circuit rejected Gall's claim that the presumption of correctness should not apply and no deference was owed to the fact findings made by the courts below because no written findings were made by the trial judge. In ft.32, the Court holds that the presumption of correctness does apply, and that they were utilizing it in their review. (A101).

However, while giving deference to the findings of fact made by the trial court, the Sixth Circuit found that those findings were not fairly supported by the record and that Gall's constitutional rights had been violated by Juror Correll's exclusion for cause. The Sixth Circuit

reviewed the entire voir dire of Juror Correll and found that his mind was not closed to the imposition of the death penalty, that he possibly could feel the death penalty was appropriate under certain circumstances, that he could follow the trial judge's instructions, and that overall his views on capital punishment were not such as to "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. at 424. Excluding this juror was not only not fairly supported by the record, it also resulted in a jury "uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

Petitioner cites two cases that do not lend support to granting the writ in this case. First, *Riley v. Taylor*, 237 F. 3d 300 (3rd Cir. 2001), *Vacated on grant of rehearing en banc*, 237 F. 3d 348 (3rd Cir. 2001), has no precedential effect due to its being vacated upon rehearing, and is inappropriately utilized. Further, *Castro v. Ward*, 138 F. 3d 810 (10th Cir. 1998), *cert. den.*, 525 U.S. 971 (1998), while featuring an uncertain juror, is highly distinguishable from the instant case. In *Riley*, the 10th Circuit points to no assurances from the juror that she can follow the instructions, that she is open to the imposition of the death penalty, or that she could possibly feel like imposing death under particular circumstances. These positions of the juror differ dramatically from Juror Correll's voir dire statements.

Finally, Petitioner raises the question of whether there was an objection or not to the exclusion of Juror Correll. There was no contemporaneous objection rule in capital cases in Kentucky at the time Gall was tried. Defense counsel in this case questioned Juror Correll vigorously in an effort to oppose the exclusion. The Kentucky Supreme Court addressed the issue on the merits rather than finding procedural default. No court has held that Gall procedurally defaulted this issue.

V.

THE SIXTH CIRCUIT CORRECTLY DECIDED UNDER *BRECHT V. ABRAHAMSON*, 507 U.S. 619 (1993) THAT THE ERROR WAS QUITE HARMFUL, AND THERE WAS NO PROCEDURAL DEFAULT AS THE JUROR WAS UNAVAILABLE AT THE STATE COURT HEARING, AND THAT THE PRESUMPTION OF CORRECTNESS OF THE STATE COURT FINDING WAS CONVINCINGLY OVERCOME AS THE JUROR DID KNOW OF PAROLE FROM ANOTHER JUROR.

Petitioner complains that habeas relief due to the trial jurors' consideration of the prejudicial extraneous evidence that Gall was on parole was erroneously based on the Sixth Circuit's de novo review, which ignored a state court finding to the contrary and which relied on evidence not presented to the state court without cause to excuse that procedural default and that the error was harmless.

Kentucky law was settled and clear when Gall was tried: Kentucky jurors cannot be presented with parole information at the trial or penalty phases and cannot consider parole either in their guilt/innocence or penalty verdicts. *See Brown v. Commonwealth*, 445 S.W. 2d 845, 848 (Ky. 1969) ("The matter of parole is beyond the province of the jury to consider....the subject of parole is not to be given any consideration by them in performing their functions.").

The prejudicial extraneous parole evidence had substantial and injurious influence in the jurors' determining their verdicts as the jurors were "considering an aggravating factor beyond what was presented at trial, and which the lawyers had been forbidden from discussing...." (A108). While the evidence that Gall killed the victim was overwhelming, the evidence that it was murder was not overwhelming in any sense, as the Sixth Circuit clearly analyzes in detail. The evidence that the appropriate sentence was death was underwhelming in light of the uncontradicted statutory mitigation that Gall was severely mentally ill and extremely emotionally disturbed. When asked by the jurors during their penalty deliberations, the trial judge chose not to instruct the jurors to not consider parole. The Sixth Circuit not only used the correct constitutional harmless error standard; it applied it correctly when the entire opinion is read. The

Sixth Circuit decision was unanimous in granting relief on this prejudicial extraneous parole evidence issue.

Contrary to the assertion of Petitioner, the Sixth Circuit used the correct standard of review and carefully set that out. (A 13-14). Juror Palmer was not at the state post-conviction hearing despite Gall's attorney's attempts to compel his attendance. The state therefore made a decision without all the relevant, legally admissible evidence. The Warden's attorneys repeatedly objected to Palmer testifying. Gall was entitled to a hearing to prove bias with testimony from Palmer. *Smith v. Phillips*, 455 U.S. 209, 215 (1982). The state court finding does not therefore deserve deference since Palmer's information was never heard by the state.

Contrary to Petitioner's claim, there was absolutely no procedural default. The issue was timely raised. The Kentucky Supreme Court did not find any procedural fault and considered the issue on the merits. *Gall v. Commonwealth*, 702 S.W.2d 37, 44 (Ky. 1986). Further, juror Palmer had moved out of state at the time of the state post-conviction hearing. Ohio refused attempts by Gall's lawyers to compel Palmer's attendance at the hearing. Palmer would not voluntarily attend the hearing. Gall's lawyers provided the state post-conviction judge an affidavit of what they believed Palmer would say had he been available pursuant to Kentucky Rule of Criminal Procedure 9.04. (State Post-Conviction Transcript of Record, Vol. II at pp. 207-09). Palmer did appear and testify at the federal habeas hearing, as his attendance was compelled by the federal district court subpoena and order pursuant to LR 5(c), FRCP 30(a); 45(d)(2) applicable to habeas corpus actions by Rule 11, Rules Governing §2254 cases. (JA 1147).

The presumption of correctness of the state court finding was convincingly overcome as it is clear beyond dispute from the sworn testimony of juror Palmer at the federal habeas hearing that he knew Gall was on parole when he committed the crime, and that his source was

extraneous as another juror had made Palmer aware of that fact. Unlike *Turpin v. Kassulke*, 26 F.3d 1392, 1401-02 (6th Cir. 1994), Gall did present significant evidence that the trial judge's determination was erroneous.

Indeed, as the Sixth Circuit said "...the juror's consideration of improper extraneous influences violated his Sixth Amendment right to an impartial jury, as well as his right of confrontation and cross-examination." (A106).

VI.
REVIEW OF A CLOSING ARGUMENT IS A MIXED QUESTION OF LAW AND FACT AND THUS REVIEW IS NECESSARILY DE NOVO; THE SIXTH CIRCUIT CORRECTLY FOUND THE PROSECUTOR'S EGREGIOUS GUILT PHASE CLOSING ARGUMENT TO HAVE VIOLATED GALL'S CONSTITUTIONAL RIGHTS.

Petitioner asserts as the compelling reason for this Court to exercise its limited jurisdiction that the Sixth Circuit failed to apply the presumption of correctness, citing a number of errors, including the Sixth Circuit's finding of an improper guilt phase closing argument given by the prosecutor in this case. However, the improper closing argument is a mixed question of law and fact, rather than solely a question of fact, and the presumption of correctness does not apply. Rather, review by the Sixth Circuit was necessarily *de novo*.

Petitioner complains of the Sixth Circuit's opinion in a generic way, rather than specifically addressing any of the Sixth Circuit's holding regarding the prosecutor's closing argument. This generic complaint, coupled with the counting of the number of previous judges who had found differently, is hardly a compelling reason to grant a *writ of certiorari*.

Petitioner also notes that there were few objections to the prosecutor's closing argument. However, Petitioner fails to note that there was no contemporaneous objection rule for capital cases in Kentucky at the time of Gall's trial, and the Kentucky Supreme Court reviewed the error on the merits rather than finding procedural default.

Petitioner's generic complaint should not gloss over the egregious nature of the prosecutorial misconduct in this case. The Sixth Circuit found the prosecutor's guilt phase closing argument "so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process violation." (A65). Included in the extensive analysis by the Sixth Circuit were prosecutorial expressions of personal opinion (A66), the mischaracterization of crucial evidence and testimony on extreme emotional disturbance and insanity (A67) which was at the heart of Gall's defense, and the warning that a not-guilty-by-reason of insanity-verdict would result in turning Gall "loose on society." (A71). This was all part of a larger strategy of improperly attacking the defense of insanity generally, rather than on the merits. "These comments and misrepresentations comprised part of a broader strategy of improperly attacking Gall's insanity defense by criticizing the very use of the defense itself, rather than addressing its evidentiary merits head on." (A68). There was massive prosecutorial misconduct in this case which violated Gall's fundamental rights to due process. Review of the Sixth Circuit's granting of relief is not warranted.

VII.
REVIEW IS NOT MERITED AS THE CONSTITUTIONALLY DEFECTIVE PENALTY PHASE INSTRUCTION AND VERDICT FORM ARE NOT LIKELY TO AFFECT ANY OTHER KENTUCKY CASE. THE UNANIMOUS SIXTH CIRCUIT DECISION IS CONSISTENT WITH *CALDERON V. COLEMAN*, 525 U.S. 141 (1998) AS THE INSTRUCTION WAS QUITE HARMFUL. PETITIONER SIGNIFICANTLY MISSTATES THAT THE SIXTH CIRCUIT FOUND THIS ISSUE PROCEDURALLY DEFAULTED.

Petitioner claims that Gall procedurally defaulted this claim, the Sixth Circuit failed to do harmless error analysis as required by *Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998) which requires a finding that an error in the whole context of the case had a substantial and injurious effect on the jury's verdict, and that *Mills v. Maryland*, 486 U.S. 367 (1988) was a new rule.

The Sixth Circuit, in effect, evaluated the error in the context of the entire record and found it had a substantial and injurious influence on the jury's verdict when it found, "[U]nlike

Kordenbrock, then, we need not even speculate as to how jurors interpreted the court's silence, because the court referred to all findings when it required unanimity," and when it found "this error so infected the sentencing phase that the resulting death sentence violated due process." (A 94, 98).

Further, this instructional error is quite harmful. Despite substantial statutory mitigation being presented on extreme emotional disturbance and severe mental illness, the jurors made a finding of no statutory mitigation. (JA 1625-26). Further, the significant statutory mitigation in *Gall* stands in stark contrast to the minimal mitigation in *Mills*, 108 S.Ct at 1873 n.1. "Because there was evidence to support the submitted but unfound mitigating circumstances, the *McKoy* error was not harmless." *State v. Sanders*, 395 S.E. 2d 412, 427-28 (N.C. 1990).

While *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) did not reverse on the unanimous jury instruction used in that case, three judges of this Court, citing *Kordenbrock*, expressed "serious concerns" about that issue in *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997). See also, *Coe v. Bell*, 161 F.2d 320, 356 (6th Cir. 1998) (Moore, J., dissenting). The instruction and verdict form used in *Gall* were very different from those used in *Kordenbrock*, and are like no other ever used in Kentucky, as there was one verdict form that required the jury to write "yes" or "no" after each mitigating circumstance "finding." The trial judge also instructed the jurors, "Your *findings* and verdict must be *unanimous* and must be signed by the foreman...." (JA 1624) (Emphasis added). There is no other known case where a Kentucky trial judge has instructed jurors to make *findings* with "yes" or "no" answers so this is not a matter that is of unusual importance. In fact, the holding in this case on the constitutionally defective mitigation instruction is highly unlikely to affect any other Kentucky case previously tried. It will only affect cases tried in the future to prohibit the future use of the special instruction and verdict

form that misled jurors in this case, which is not an instruction or form recommended to or used by Kentucky judges.

Contrary to Petitioner's claim, the inability of an individual juror to fully consider individually mitigation is not a new rule in light of the clear holdings of this Court in *Andres v. United States*, 333 U.S. 740 (1948), and *Lockett v. Ohio*, 438 U.S. 586 (1978). Both were cited in *Mills*. The *Lockett* principle was firmly established before Gall's conviction became final. While the Fifth and Eighth Circuits have found that *Mills* announced a new rule under *Teague v. Lane*, 489 U.S. 288 (1989) and *Gall* is in conflict with those two circuits, Petitioner has not raised that as a reason for granting the Writ, and *Gall's* alternate ground for relief is consistent with the Fourth Circuit that found the error to fall within *Teague's* second narrow exception to the nonretroactivity of new rules in that it is a watershed procedure "implicit in the concept of ordered liberty." *Williams v. Dixon*, 961 F.2d 448, 455–56 (4th Cir. 1992).

This issue was not procedurally defaulted as Petitioner claims. This instruction issue was raised to the Kentucky Supreme Court. (June 20, 1979 Brief to Kentucky Supreme Court pp. 117–118), and Petitioner conceded this in its Brief to the Sixth Circuit where it stated, "The requirement that the jury instructions be unanimous on the existence or non-existence of mitigating circumstances was raised on direct appeal...." (October 3, 1994 Petitioner's Brief p. 28). The Kentucky Supreme Court, in considering the instructions issues, reviewed them on the merits and did not clearly and expressly find any instruction issue procedurally defaulted.

Petitioner asserts that the Sixth Circuit determined this claim procedurally defaulted but that it was excused due to ineffective assistance. (P29). This is a significant misstatement by Petitioner. The Sixth Circuit found this issue was not procedurally defaulted. "We disagree with

the Commonwealth's contention that Gall defaulted this claim...The claim is therefore not defaulted." (A 82-83).

The Sixth Circuit was unanimous in granting relief on this issue. As stated by Guy, Circuit Judge, concurring in part, dissenting in part, "I agree with all of those sections of the court's opinion and will only address the findings with which I take issue." (A 113-114). Footnote 3 states, "In overturning the defendant's conviction, the court makes the penalty phase of the trial moot. Since the court has addressed this issue, however, I would indicate my concurrence in the result reached on the penalty issue without subscribing to all of the analysis used by the court to reach its result." (A 114).

Because it granted the Writ on the basis of this error, the Sixth Circuit did not address another substantial error raised by Gall. In ft. 27, the Sixth Circuit stated, "Gall also claims that his sentencers-both the jury and trial judge-violated his Eighth and Fourteenth Amendment rights under *Lockett* because they did not adequately consider evidence presented in mitigation of his crime. Specifically, Gall argues that there was "massive evidence" supporting the insanity defense and other evidence of mental illness, in the form of Dr. Noelker's and Dr. Toppen's testimony, as well as extensive testimony of Gall's personal and medical history. We need not address this evidentiary challenge to the sentencing decision because we find that the court's instructions to the jury were constitutionally flawed." (A 81). This yet again demonstrates that this case is a poor vehicle for deciding important issues of law because this issue reserved by the Sixth Circuit would have to be resolved if *certiorari* were granted on other issues.

VIII.

PETITIONER MISSTATED THE HOLDING OF THE SIXTH CIRCUIT ON THE ISSUE OF WHETHER GALL'S CONFRONTATION RIGHTS WERE DENIED BY THE PLAYING OF A VIDEO DEPOSITION OF THE PRIMARY ACCUSER ON THE ISSUE OF SANITY: CONTRARY TO THE PETITION BECAUSE OF THE MANY OTHER ERRORS IN THE CASE. THE COURT DID NOT RESOLVE THE ISSUE OF WHETHER A FUNDAMENTAL MISCARRIAGE OF JUSTICE OCCURRED.

Petitioner states that a reason for granting extraordinary *certiorari* jurisdiction is that the Sixth Circuit erred in holding first that Gall's confrontation rights had been violated, and second that a fundamental miscarriage of justice occurred sufficient to excuse the procedural default. Petitioner seriously misstates the holding of the Sixth Circuit in the second of these two statements.

Petitioner is correct in the statement that the Sixth Circuit found that Gall's Sixth Amendment right to be confronted by the accusers against him had been violated. The Sixth Circuit correctly decided that Gall's confrontation rights had been violated. Gall presented an insanity defense. A psychologist and a psychiatrist, Dr. Noelker and Dr. Toppen, both testified that Gall was indeed insane at the time of the crime. Their testimony was unequivocal and soundly based. The only evidence against this position was that offered by the Commonwealth through Dr. Lee Chutkow, a psychiatrist who had examined Gall one time and only for the purpose of evaluating Gall's competency to stand trial. He was brought to the site of the trial, but was questioned on video camera in another part of the courthouse. Gall was not present at the deposition. Gall never waived his right to be present at the deposition. Dr. Chutkow believed he was testifying at a competency hearing rather than at trial on the issue of competency. However, his videotaped deposition was offered at trial in rebuttal of the testimony of Drs. Noelker and Toppen.

The Sixth Circuit found this to have violated the Confrontation Clause. Further, the Court found that the constitutional violation had actually prejudiced Gall. "[I]t is beyond doubt

that [Dr. Chutkow's] presence at trial would have corrected that misperception, making it clear that the Commonwealth was placing him in a far more central role than he realized at the time—if for no other reason than the fact that juries do not determine issues of competency, but resolve the fundamental questions of guilt versus innocence and sanity versus insanity. Additionally, had Dr. Chutkow been in court and his role clarified, Gall's defense counsel would have obtained a greater opportunity to challenge the only evidence the Commonwealth had put forth regarding Gall's sanity. There is thus no question that the violation bore a dramatic impact on the outcome of the trial, rendering actual prejudice to Gall's defense." (A77-78).

The Sixth Circuit, however, found that Gall had procedurally defaulted this claim by not raising it in state court. Further, the Court found that Gall had not shown cause for his failure to raise the claim. (A79). The Court then considered whether the procedural default could be excused as a result of a "fundamental miscarriage of justice." (A80). The Court found that the "Confrontation Clause violation likely stood in the way of an acquittal for reason of insanity." (A80). It is at this point that Petitioner seriously misstates the holding of the Sixth Circuit.

Petitioner states that the "Sixth Circuit's conclusion that this amounted to a fundamental miscarriage of justice is erroneous as a matter of fact and as a matter of law...The Sixth Circuit panel *sub silentio* ignored the finding of fact made by the U.S. District Court regarding Gall's claim of legal insanity in finding fundamental miscarriage of justice regarding the admission of Dr. Chutkow's deposition." (P32.) Certainly, Gall had urged the Court to find a miscarriage of justice exception to procedural default on this issue. However, the Sixth Circuit did not reach the question. The Court stated instead that this "case thus poses the question of whether, under *Coleman*, *Schlup*, and this Circuit's caselaw, a fundamental miscarriage of justice results when a trial error more likely than not stood in the way of a verdict of acquittal due to insanity. *Because*

of the other errors described supra, we need not address this new and difficult question." (A81). This again demonstrates that this case is a poor vehicle for deciding important issues of law because this issue would have to be resolved by the Sixth Circuit even if *certiorari* jurisdiction were to be granted on other issues.

CONCLUSION

The decision by the Sixth Circuit applies settled principles of law to a complicated set of facts after meticulous review in an opinion of 131 pages. This case is rife with constitutional errors upon which the Sixth Circuit granted the Writ. This is not a case meriting *certiorari* review by this Court, as Petitioner has not presented "compelling reasons" under Rule 10 of the Rules of the Supreme Court of the United States. That Rule indicates that a "petition for *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." There are no significant conflicts of law cited by Petitioner. The Sixth Circuit opinion has not decided important federal questions in a way that conflicts with decisions of this Court.

There are other reasons why *certiorari* review by this Court is not warranted. This is a pre-Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996) case. The Sixth Circuit was unanimous on the need for a new penalty phase. (A 113-14 n.3) (Guy, J concurring on the penalty phase errors of *Witherspoon*; *Mills* instruction/verdict form; and extraneous prejudicial parole information, dissenting in part). It is not disputed by anyone that Eugene Gall, Jr. is a severely mentally ill man. Gall will never be released from custody. The Sixth Circuit's decision will be followed in Kentucky by involuntary hospitalization pursuant to KRS Chapter 202A proceedings resulting in his confinement for the remainder of his life due to his permanent psychotic condition. Gall's serving out multiple

pending sentences in Ohio, including a life sentence, would follow any release from Kentucky confinement. (JA 2241-43).

The petition presents a poor vehicle for considering the issue of the appropriate use of the correct standard of review because the Sixth Circuit carefully used and applied the correct standard of review:

> This court reviews *de novo* a district court's refusal to grant a writ of habeas corpus. *See McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). We review the district court's findings of fact for clear error. *See id.* Given the complexity of this case, our review, of necessity, must be explicit. Primary or historical facts found by state courts are "presumed correct and are rebuttable only by clear and convincing evidence." *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999). District court findings of fact based upon its review of state court records or written decisions receive plenary review. *See Caldwell v. Russell*, 181 F.3d 731, 735 (6th Cir. 1999). Determinations involcing mixed questions of fact and law, receive *de novo* review. *See Mapes*, 171 F.3d at 413. State court interpretaions of state law generally bind the federal reviewing court. *See Caldwell*, 181 F.3d at 735-36. (A13-14).

The petition also presents a poor vehicle for review as the Sixth Circuit judgment is supported by numerous alternative findings. Because the Sixth Circuit's judgment is correct on numerous grounds the judgment will not be affected by this Court's granting review on the standard of review issues, which are themselves bound in many, complicated facts.

The writ should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Brief in Opposition was served by first class mail to Rickie Pearson and Ian Sonego, Assistant Attorney Generals, 1024 Capital Center Drive, Suite 200, Frankfort, Ky. 40601-8204 on May 21, 2001.

Erwin W. Lewis